UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADAM STARKE, Individually and On Behalf of All Others Similarly Situated,	Case No: 1:13-CV-05497-LLS
Plaintiff,	Hon. Louis L. Stanton
v.	Electronically Filed
GILT GROUPE, INC.,	
Defendant.	

MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

Aryeh L. Pomerantz
Pomerantz & Pomerantz, PLLC
3 College Rd.
Suite 102
Monsey, NY 10952
Tel. (845) 547-2600
Fax (845) 547-2601
aryeh@pom-law.com

James C. Shah
Shepherd, Finkelman, Miller & Shah, LLP
35 E. State Street
Media, PA 19063
Tel. (610) 891-9880
Fax (866) 300-7367
jshah@sfmslaw.com

Mark Schlachet (0009881)
3515 Severn Road
Cleveland, Ohio 44118
Tel. (216) 896-0714
Fax (216) 514-6406
mschlachet@gmail.com

DATED: March 18, 2014

TABLE OF CONTENTS

Table of Authorities ii

I. INTRODUCTION 1

II. RELEVANT FACTUAL ALLEGATONS 2

III. ARGUMENT 3

A. Dismissal Of This Case In Favor Of Arbitration Is Neither Legally Proper Nor Factually Supported 3

1. Applicable Standard On A Motion Seeking Arbitration 3

2. Gilt's Purported "Evidence" Of An Arbitration Agreement Is Fatally Flawed 5

a. There Is No Credible Evidence Supporting The Existence Of An Arbitration Agreement 5

b. The Purported Arbitration Agreement Is Ridden With Ambiguities And Invalidly Presented 6

3. The Purported Arbitration Agreement Is Unconscionable 10

B. Plaintiff States A Claim Under New York's False Advertising Law 14

1. Rule 12(b)(6) Standard 14

2. Plaintiff Has Adequately Alleged Injury 14

IV. CONCLUSION 16

TABLE OF AUTHORITIES

Cases

2181752 Ont. Inc. v. United Nat'l Funding, LLC,
2009 U.S. Dist. LEXIS 42747 (S.D.N.Y. May 4, 2009)....6

Ackerman v. Coca-Cola Co.,
2010 U.S. Dist. LEXIS 73156 (E.D.N.Y. July 21, 2010)....15

Alexander v. Anthony International, L.P.,
341 F.3d 256 (3d Cir. 2003)....5

Almacenes Fernandez, S.A. v. Golodetz,
148 F.2d 625 (2d Cir.1945)....4

Anwar v. Fairfield Greenwich Ltd.,
728 F.Supp.2d 372 (S.D.N.Y. 2010)....14

Ashcroft v. Iqbal,
129 S.Ct. 1937 (2009)....14

Bank v. WorldCom, Inc.,
2002 N.Y. Misc. LEXIS 33 (N.Y. Sup. Ct. 2002)....12

Bell v. Cendant Corp.,
293 F.3d 563 (2d Cir. 2002)....5

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007)....14

Bensadoun v. Jobe-Riat,
316 F.3d 171 (2d Cir. 2003)....4

Brower v. Gateway 2000,
246 A.D.2d 246 (1998)....11, 12

Cap Gemini Ernst & Young U.S., LLC v. Nackel,
346 F.3d 360 (2d Cir. 2003)....4

Chambers v. Time Warner, Inc.,
282 F.3d 147 (2d Cir. 2002)....14

Chiacchia v National Westminster Bank,
124 A.D. 2d 626 (1986)....9

Coimex Trading (Suisse) S.A. v. Cargill Int'l S.A.,
2005 U.S. Dist. LEXIS 6589 (S.D.N.Y. Apr. 15, 2005) 10

Deutsch v. Long Island Carpet Cleaning Co.,
5 Misc. 2d 684 (N.Y. Sup. Ct. 1956) 13

Doctor's Assocs., Inc. v. Casarotto,
517 U.S. 681 (1996) 5

Dwyer v. Biddle,
274 A.D. 903 (1948) 13

Ebin v. Kangadis Food Inc.,
2014 U.S. Dist. LEXIS 26439 (S.D.N.Y. Feb. 24, 2014) 15

Gardner & North Roofing & Siding Corp. v. Demko,
370 N.Y.S.2d 294 (1974) 12

Gillman v. Chase Manhattan Bank, N.A.,
73 N.Y.2d 1 (1988) 10

Goshen v. Mut. Life Ins. Co. of New York,
98 N.Y.2d 314 (2002) 15

Hines v. Overstock.com, Inc.,
2010 WL 2203030 (2d Cir. June 3, 2010) 3

Hirsch v. Citibank, N.A.,
2013 U.S. App. LEXIS 21350 (2d Cir. Oct. 22, 2013) 6, 9

In re Initial Pub. Offering Sec. Litig.,
383 F.Supp.2d 566 (S.D.N.Y.2005) 14

Jernow v. Wendy's Intern., Inc.,
2007 WL 4116241 (S.D.N.Y. Nov. 15, 2007) 15

King v. Fox,
7 N.Y.3d 181 (2006) 11

Leasing Serv. Corp. v. Justice,
673 F.2d 70 (2d Cir. 1982) 10

Miner v. Walden,
101 Misc. 2d 814 (1979) 13

Naval v. HIP Network Servs. IPA, Inc.,
620 F. Supp. 2d 566 (S.D.N.Y. 2009) 10-11

Ng v. HSBC Mortg. Corp.,
2011 U.S. Dist. LEXIS 88549 (E.D.N.Y. Aug. 10, 2011) 11

Novak v. Overture Servs.,
309 F. Supp. 2d 446 (E.D.N.Y. 2004) 12

Opals on Ice Lingerie v. Body Lines Inc.,
320 F.3d 362 (2d Cir. 2003) 4

Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.,
85 N.Y.2d 20 (N.Y. 1995) 3

Rothstein v. Fung,
2004 WL 1151568 (S.D.N.Y. May 24, 2004) 4

Sablosky v. Edward S. Gordon Co.,
73 N.Y.2d 133 (1989) 13

Shomo v. City of New York,
579 F.3d 176 (2d Cir. 2009) 14

Specht v. Netscape Commc'ns Corp.,
306 F.3d 17 (2d Cir. 2002) 6-7, 10

Thai Lao Lignite (Thailand) Co. v. Gov't of the Lao People's Democratic Republic,
2011 U.S. Dist. LEXIS 103378 (S.D.N.Y. Sept. 13, 2011) 6

United States v. Maldonado-Rivera,
922 F.2d 934 (2d Cir. 1990) 6

Rules

Fed. R. C. P. 8(a)(2) 14

Fed. R. C. P. 12(b)(6) 3

Statutes

9 U.S.C. § 1 3

Other Authorities

Restatement Second Contracts § 208 10

Plaintiff, Adam Starke ("Plaintiff"), by and through his undersigned counsel, respectfully submits this Memorandum of Law in Opposition to the Motion to Dismiss ("Motion to Dismiss" or "Motion") filed by Defendant, Gilt Groupe, Inc. ("Defendant" or "Gilt"). For the reasons stated below, Gilt's Motion to Dismiss should be denied in its entirety.

I. INTRODUCTION

Gilt moves to dismiss the Complaint asserting two meritless grounds. Gilt improperly invokes the affirmative defense of arbitration, arguing that Plaintiff is contractually bound to bring his dispute as an individual case in an arbitration forum. Moreover, Gilt incorrectly argues that Plaintiff has not adequately alleged injury and damages under the "New York false advertising and deceptive business practices law."[1] Neither argument is persuasive.

Gilt's arbitration challenge suffers from multiple flaws. ***First***, Gilt relies solely upon three extraneous documents – a Sign-up webpage, a "Gilt Terms and Conditions" webpage, and a "Website Terms of Use" webpage – to demonstrate the existence of an agreement to arbitrate between Plaintiff and Gilt. But each of these documents is unauthenticated, lacks personal knowledge, and is woefully ambiguous. Absent any other support, there is simply no factual basis for the Court to conclude that an arbitration agreement exists between Gilt and Plaintiff. ***Second***, the "Website Terms of Use," which

[1] There is an important inconsistency as between Gilt's Motion and supporting Memorandum of Law. Although Gilt's Memorandum of Law states that Plaintiff has failed to sufficiently plead *any* claim upon which relief may be granted (*see* p.1), the remainder of the Memorandum of Law and the Motion itself challenge only Plaintiff's New York statutory claim, ***not*** his contract claims as set forth at ¶¶ 71-80 of the Complaint. Accordingly, Gilt waives all pleading challenges as to Plaintiff's contract claims, including the lack of injury argument asserted as to Plaintiff's statutory claim.

contains the purported arbitration clause that Gilt seeks to enforce, is buried two tiers down from the Sign-up webpage and only after two hyperlinks must be clicked by the consumer. Under Second Circuit law, such "submerged" arbitration clauses cannot establish Plaintiff's assent to the arbitration clause at issue here. Indeed, given the glaring ambiguities plaguing all three of the documents proffered by Gilt, Plaintiff cannot be deemed to have assented to the "Gilt Terms and Conditions," much less to the more remote "Website Terms of Use." ***Third***, the arbitration clause's forum selection and injunctive relief provisions fail on unconscionable and lack of mutuality grounds. These deficiencies, whether taken separately or together, render enforcement of the arbitration clause in this case wholly inappropriate.

Next, Gilt contends that Plaintiff alleges non-cognizable injury and damages under New York's false advertising law. Not so. Gilt conveniently ignores Plaintiff's allegations that Gilt promised, but did not deliver a bamboo product and that Plaintiff is entitled to, at a minimum, the difference between what he paid for (bamboo) and what he received (rayon). Thus, Plaintiff has properly pled injury under New York law.

Gilt's Motion to Dismiss fails on both grounds and should be denied.

II. RELEVANT FACTUAL ALLEGATONS

This class action seeks to remedy Gilt's unfair, deceptive, and unlawful business practice of advertising, marketing, and selling its textile products not directly woven from bamboo fibers as "bamboo." Complaint, ¶¶ 1, 8-11, 29-44. To date, Gilt has continued unabated to engage in this misconduct, even though such deceptive practices have been the subject of extensive FTC ("Federal Trade Commission") guidance, regulation, warnings and litigation since 2009. Complaint, ¶¶ 3-8, 47-52. Because Gilt's conduct violates the FTC's antifraud provisions, it simultaneously violates New York General Business Law §§ 349-50. *See Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26 (N.Y. 1995). The Complaint alleges that Gilt's misrepresentations and omissions created the false impression among consumers that the "bamboo" products it sells are, indeed, bamboo, and thus possess the "superior qualities inherent in Bamboo." Complaint, ¶ 38. It further alleges that each Class member did not receive "a Product possessing the benefits promised by the advertising claims." Complaint, ¶ 43. Upon purchasing swaddling blankets falsely advertised as "bamboo" by Gilt, Plaintiff commenced this class action suit alleging that Gilt had committed, and continues to commit,[2] violations of law giving rise to both contract and tort claims for damages, injunctive relief, as well as unjust enrichment. Complaint, ¶¶ 3-8, 47-55, 64-80.

III. ARGUMENT

A. Dismissal Of This Case In Favor Of Arbitration Is Neither Legally Proper Nor Factually Supported

1. Applicable Standard On A Motion Seeking Arbitration

A party seeking to invoke the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"), must make a *prima facie* showing that an agreement to arbitrate exists. *See Hines v. Overstock.com, Inc.*, No. 09-4201, 2010 WL 2203030, at *1 (2d Cir. June 3, 2010). To justify compelling arbitration, this Court must first determine that the parties entered into a contractually valid arbitration agreement and that the parties' dispute falls within the scope of that agreement. *See Cap Gemini Ernst & Young U.S., LLC v. Nackel*, 346 F.3d 360, 365 (2d Cir. 2003) (citations omitted).

---

[2] As of March 17, 2014, Gilt has continued to advertise the same product, with the same unlawful misrepresentation. *See* http://www.gilt.com/sale/children/everything-but-the-baby-3216/product/135719183-aden-anais-bamboo-swaddling-wraps-br-set-of-3? (last visited March 17, 2014).

"In the context of motions to compel arbitration . . . the court applies a standard similar to that applicable for a motion for summary judgment. ***If there is an issue of fact as to the making of the agreement for arbitration, then a trial is necessary***." *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003) (internal citations omitted) (emphasis added). The party seeking arbitration of the case bears an initial burden of demonstrating that an agreement to arbitrate was made. *See Almacenes Fernandez, S.A. v. Golodetz,* 148 F.2d 625, 628 (2d Cir.1945) (noting that the parties seeking a stay in favor of arbitration "supported their application . . . by showing at least *prima facie* that" an agreement to arbitrate was proposed and was accepted); *Rothstein v. Fung*, No. 03 Civ. 0674, 2004 WL 1151568, at *1 (S.D.N.Y. May 24, 2004) ("As the moving party, defendants bear the burden of proving written agreements obligating both plaintiffs to arbitrate."). Accordingly, Gilt – ***not Plaintiff*** – bears the initial burden of demonstrating that an arbitration agreement was made and that it covers the parties' dispute.

While the FAA creates a "body of federal substantive law of arbitrability …. in evaluating whether the parties have entered into a valid arbitration agreement, the court must look to state law principles." *Cap Gemini*, 346 F.3d at 364 (internal citations omitted). In creating the FAA, Congress intended to "make arbitration agreements as enforceable as other contracts, ***but not more so***." *Opals on Ice Lingerie v. Body Lines Inc*., 320 F.3d 362, 369 (2d Cir. 2003) (emphasis in original). "[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Bell v. Cendant Corp*., 293 F.3d 563, 566 (2d Cir. 2002) ("[T]he ultimate question of whether the parties agreed to arbitrate is determined by state law."); *Alexander v. Anthony International*, L.P., 341 F.3d 256, 264 (3d Cir. 2003) (applying "relevant state law of contracts" in making determination on enforceability of arbitration agreement). Here, because Plaintiff is a New York resident, Gilt is headquartered in New York, and the underlying transaction took place in New York, New York law applies. Complaint, ¶¶ 21, 24-26.

As explained below, Gilt does not even come close to satisfying its initial burden of demonstrating the existence of an arbitration agreement between Plaintiff and Gilt under New York law. Accordingly, arbitration should be denied.

2. Gilt's Purported "Evidence" Of An Arbitration Agreement Is Fatally Flawed

a. There Is No Credible Evidence Supporting The Existence Of An Arbitration Agreement

Gilt's sole factual support for an agreement to arbitrate is a single attorney declaration that merely attaches website registration/membership documents purporting to show that Plaintiff agreed to waive his right to bring an action in this Court.[3] Critically, other than claiming that the attached documents are "true and correct" copies, the attorney declaration says nothing about the personal knowledge of the declarant or the authenticity of the attached documents, including where the documents are from, who created them, how they are used, and what timeframe they cover. Indeed, the declaration does not even attempt to make the most basic assertion that the attached documents were

[3] Gilt does not contend that the transactional documents relating to Plaintiff's purchase and sale of the swaddling blankets contained an arbitration clause.

the ones posted on Gilt's website at the time that Plaintiff signed up to be a member.

These evidentiary deficiencies are fatal and the Court should reject the declaration and attached documents as evidence of an arbitration agreement. *United States v. Maldonado-Rivera*, 922 F.2d 934, 972 (2d Cir. 1990) (holding that the "court properly declined to credit [an] attorney's affidavit because it was not based on the attorney's personal knowledge"); *Thai Lao Lignite (Thailand) Co. v. Gov't of the Lao People's Democratic Republic*, Case No. 1:10-cv-5256, 2011 U.S. Dist. LEXIS 103378, at *14-15 (S.D.N.Y. Sept. 13, 2011) (statements in an attorney's affidavit not based on personal knowledge are not entitled to evidentiary weight); *2181752 Ont. Inc. v. United Nat'l Funding, LLC,* Case No.1:09-cv-01018, 2009 U.S. Dist. LEXIS 42747, at *5 (S.D.N.Y. May 4, 2009) (" . . . supporting affidavit 'must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated'").

b. The Purported Arbitration Agreement Is Ridden With Ambiguities And Invalidly Presented

Even if the Court were to consider the attorney declaration and attached documents as evidence of an arbitration agreement, which they are not, the documents do not establish that the parties entered into an arbitration agreement, much less a valid one. As the Second Circuit recently explained in *Hirsch v. Citibank, N.A.*, No. 13-1172-cv, 2013 U.S. App. LEXIS 21350 (2d Cir. Oct. 22, 2013):

> We have held that "receipt of a physical document containing contract terms or notice thereof is frequently deemed, in the world of paper transactions, a sufficient circumstance to place the offeree on inquiry notice of those terms." *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 31 (2d Cir. 2002). While "[i]t is true that a party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing[,]. . . ***[a]n exception to this general rule exists when the writing does not***

> ***appear to be a contract and the terms are not called to the attention of the recipient*. *In such a case no contract is formed with respect to the undisclosed term*.”** *Id*. at 30 (citation and internal quotation marks omitted). This presents an issue of fact that has yet to be determined.

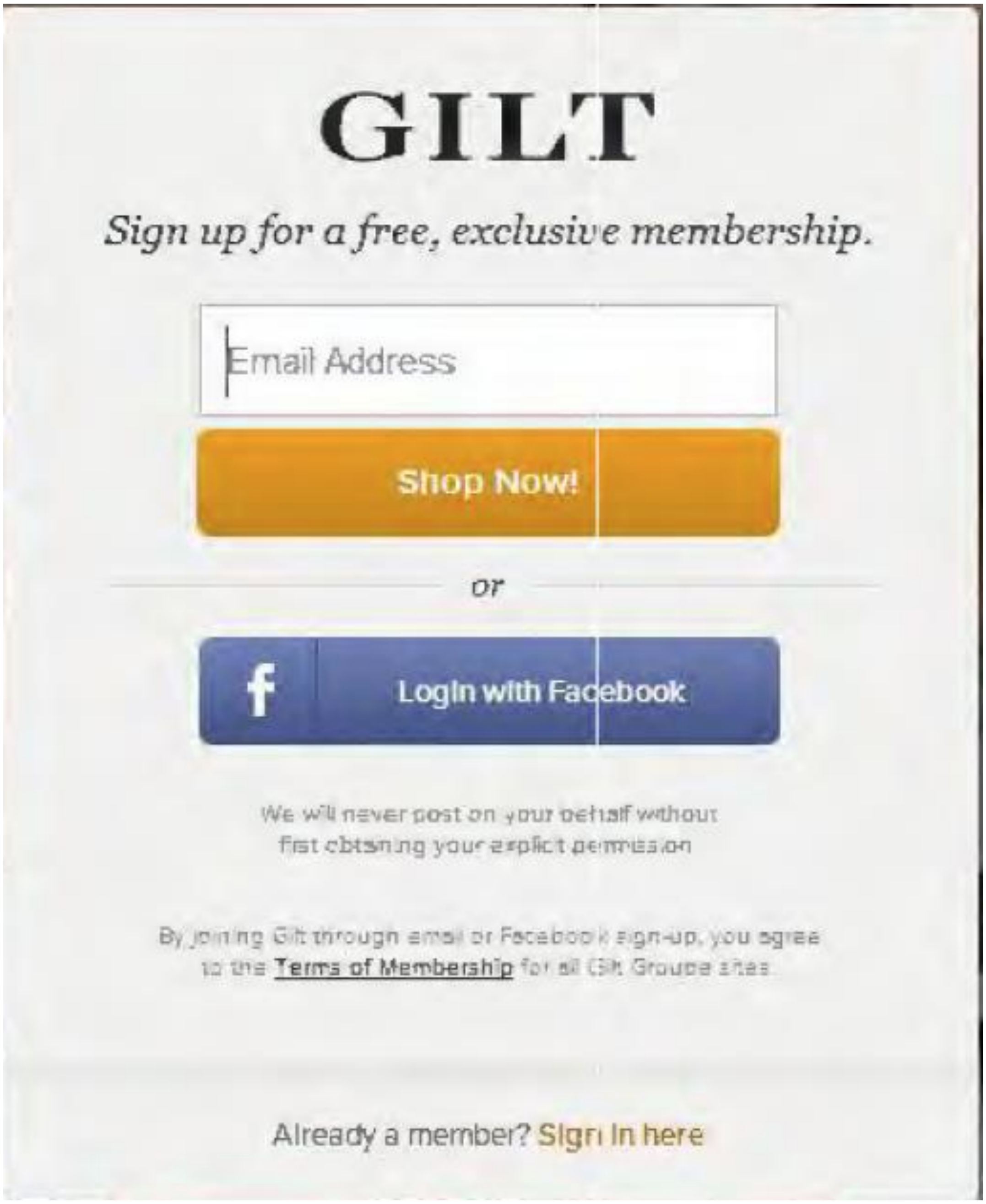
Id. at *5. (Emphasis added.)

Specht, supra, is also telling. In *Specht*, the Second Circuit examined whether an internet user who downloaded software by clicking a button was bound by additional contractual terms where those terms were not easily identifiable. 306 F.3d at 21-26. The Second Circuit held that “a consumer’s clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms.” *Id.* at 29-30. The Second Circuit further held:

> We conclude that in circumstances such as these, where consumers are urged to download free software at the immediate click of a button, a reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms. The SmartDownload webpage screen was “printed in such a manner that it tended to conceal the fact that it was an express acceptance of [Netscape’s] rules and regulations.” . . . Internet users may have, as defendants put it, “as much time as they need[]” to scroll through multiple screens on a webpage, but there is no reason to assume that viewers will scroll down to subsequent screens simply because screens are there.

306 F.3d at 32.

Here, the extraneous documents proffered by Gilt are not only fatally ambiguous, they show that the purported arbitration clause was buried within multiple layers of webpage screens that were accessible only by clicking multiple hyperlinks, such that Plaintiff could not possibly have assented to the clause. The first two documents include a Sign-up box that appears on the Gilt Home Page and a separate terms and conditions webpage. The Sign-up box states that the consumer will become a Gilt member and agrees to be bound by the "Terms of Membership" upon entering a valid email address or signing into Facebook:


GILT
Sign up for a free, exclusive membership.
Email Address
Shop Now!
or
Login with Facebook
Already a member? Sign In here

However, when the consumer clicks on the "Terms of Membership" hyperlink, the consumer is directed to an entirely different webpage with a different title – "Gilt Terms and Conditions," ***not*** "Terms of Membership":[4]

Gilt Terms and Conditions

These Terms and Conditions of Service ("Terms of Service") govern your membership on Gilt.com and its associated mobile sites (the "Gilt Sites" or the "Sites") and your purchases and use of products and services available through the Gilt Sites. The Gilt Sites are operated by Gilt Groupe Holdings, Inc. and/or its subsidiaries and affiliates (collectively, "Gilt"). Your use of the Gilt Sites and these terms are also governed by the Website Terms of Use ("Terms of Use"), which are incorporated herein by reference. www.gilt.com/company/websiteterms

This discrepancy is significant because it raises substantial reasonable doubt that the "Gilt Terms and Conditions" are the same as the "Terms of Membership" referenced in the Sign-up box. *Chiacchia v National Westminster Bank*, 124 A.D. 2d 626, 628 (1986) (holding that bank's purported agreement was unincorporated and non-binding where the bank customer signed a safety deposit box rental agreement containing no direct reference to or description of the challenged language, because to be incorporated by reference, a document must be "so referred to and described in the instrument that the paper may be identified beyond all reasonable doubt. . . . That rule of law is grounded on the premise that the material to be incorporated is so well known to the contracting parties that a mere reference to it is sufficient").

Even more ambiguous is the third document proffered by Gilt – the "Website Terms of Use." Although the "Gilt Terms and Conditions" purports to incorporate the "Website Terms of Use," that document is located two tiers of hyperlinks away from the Sign-up box. Worse yet, the arbitration clause set forth in the "Website Terms of Use" appears only after scrolling down sixteen paragraphs into the document. As in *Hirsch* and *Specht*, the "Website Terms of Use" and its arbitration clause are far too removed from the Sign-up box to reasonably conclude that Plaintiff agreed to them. In situations such as here, where it would require a number of "sweeping conclusions" to hold Plaintiff bound by the purported arbitration clause, this Court has been unwilling to draw such sweeping conclusions. *Coimex Trading (Suisse) S.A. v. Cargill Int'l S.A.*, 05 Civ. 2630 (LLS), 2005 U.S. Dist. LEXIS 6589, at *3 (S.D.N.Y. Apr. 15, 2005) (denying motion to stay pending Swiss arbitration, explaining that "[n]o reason appears to support such a sweeping conclusion. The contract of sale contains no language adopting any portion of the ASBATANKVOY form except those specifically referring to notice of readiness and laytime counting.").

---

[4] Only the first paragraph of the "Gilt Terms and Conditions" is presented here. A complete copy of the same is attached as Exhibit B to the Stahl Declaration.

3. The Purported Arbitration Agreement Is Unconscionable

The doctrine of unconscionability is routinely employed to deny enforcement to harsh and unreasonable contract terms. *Leasing Serv. Corp. v. Justice*, 673 F.2d 70, 71 (2d Cir. 1982); *see also* Restatement Second Contracts § 208 (noting that if a contract or term thereof is unconscionable at the time the contract is made, a court may refuse to enforce the contract, may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result).

Under New York law, a contract is deemed unconscionable if it "is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms." *Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 10 (1988). The party alleging unconscionability must generally show both substantive and procedural unconscionability. *Naval v. HIP*

Network Servs. IPA, Inc., 620 F. Supp. 2d 566, 571 (S.D.N.Y. 2009). In other words, "[t]he contract must unreasonably favor one party over the other and the process of contract formation must have deprived the disadvantaged party of meaningful choice. *Ng v. HSBC Mortg. Corp*., 07-CV-5434 (RRM)(VVP), 2011 U.S. Dist. LEXIS 88549, at *24 (E.D.N.Y. Aug. 10, 2011); *King v. Fox*, 7 N.Y.3d 181, 191 (2006). "As to the procedural element, a court will look to the contract formation process to determine if in fact, one party lacked any meaningful choice in entering into the contract, taking into consideration such factors as the setting of the transaction, the experience and education of the party claiming unconscionability, whether the contract contained 'fine print,' whether the seller used high-pressured tactics' and any disparity in the parties' bargaining power." *Brower v. Gateway 2000*, 246 A.D.2d 246, 253 (1998). The substantive element "entails an examination of the substance of the [a]greement in order to determine whether the terms unreasonably favor one party." *Id*. at 254. "While it is true that, under New York law, unconscionability is generally predicated on the presence of both the procedural and substantive elements, the substantive element alone may be sufficient to render the terms of the provision at issue unenforceable." *Id*.

Here, Gilt has not only impermissibly buried its arbitration clause amongst multiple hyperlinks and webpages, *supra*, it has blind-sided Plaintiff with unfair forum selection and injunctive relief provisions that overwhelmingly favor Gilt. With respect to the forum selection clause, Gilt has unilaterally selected New York as the arbitration venue. However, New York courts have expressly disapproved of such clauses because they effectively discourage consumers from bringing their claims:

> [T]he court believes that there may be something inherently wrong and unfair in setting the venue for an arbitration in a distant city, when the

> amount in issue is a relatively small amount. This effectively deprives consumers of the opportunity to have their claims heard. One of the bases of the *Brower* court in removing ICC as the arbitral body, was the undue expense of maintaining an arbitration before the ICC. However, requiring that the arbitration be held in a distant city also imposes an undue expense, and may well be used as a way to discourage the bringing of claims.

Bank v. WorldCom, Inc., No. 122484/00, 2002 N.Y. Misc. LEXIS 33, at *10-11 (N.Y. Sup. Ct. 2002); *see also Brower*, 246 A.D.2d at 254 ("[T]he excessive cost factor that is necessarily entailed in arbitrating before the ICC is unreasonable and surely serves to deter the individual consumer from invoking the process. Barred from resorting to the courts by the arbitration clause in the first instance, the designation of a financially prohibitive forum effectively bars consumers from this forum as well; consumers are thus left with no forum at all in which to resolve a dispute.") (internal citations omitted).

In cases involving nationwide class actions such as here, where consumers from all over the country are alleged to have been deceived by Gilt, the concerns raised in *Bank* and *Brower* are even more prominent. For this reason, the Court should reject Gilt's forum selection provision as unconscionable. *Gardner & North Roofing & Siding Corp. v. Demko*, 370 N.Y.S.2d 294, 296 (1974) (courts should not enforce written forum agreements if they are unconscionable, unreasonable or contrary to public policy and good morals); *cf. Novak v. Overture Servs*., 309 F. Supp. 2d 446, 451 (E.D.N.Y. 2004) (upholding forum selection clause because, although registration for Google's discussion groups required that plaintiff to accept certain terms and conditions of use, "[o]n this page is a window for viewing the 'terms and conditions' contract and a button to indicate acceptance of the terms contained therein. . . [with] [t]his window allow[ing] for the viewing of ten lines at a time," which Gilt's sign-up page did not have).

Similarly, Gilt unilaterally granted itself the right to pursue court action for injunctive relief, while depriving Plaintiff of the same right. New York courts have also rejected such provisions as lacking mutuality and unconscionable. *See, e.g., Deutsch v. Long Island Carpet Cleaning Co*., 5 Misc. 2d 684, 685 (N.Y. Sup. Ct. 1956) ("Parties may, of course, expressly agree that only certain types of controversies between them shall be arbitrated. Here, however, we have a company engaged in furnishing services to retail customers unilaterally inserting an arbitration clause on the reversed side of a receipt. The customer signs it, receives a copy, and subsequently is sent a signed confirmation, which also has the printed conditions on the reversed side. But at no time is any specific reference made to the arbitration clause. Under these circumstances, it cannot be said to represent a conscious agreement to limit arbitration to the customer's claims only. It is therefore unenforceable for lack of mutuality of obligation."); *Dwyer v. Biddle*, 274 A.D. 903, 904 (1948) ("There is no satisfactory showing of the existence of a reciprocally enforceable written contract of the parties containing the claimed arbitration clause."); *Miner v. Walden*, 101 Misc. 2d 814, 819-20 (1979) (rejecting as unconscionable and unilateral an agreement to arbitrate between a doctor and patient that purported to be "an exchange of promises to arbitrate with each promise serving as consideration for the other[,]" but excluded from the agreement any claims of money for services that the doctor possessed); *Sablosky v. Edward S. Gordon Co*., 73 N.Y.2d 133, 138 (1989) ("some courts have invalidated unilateral arbitration clauses for want of mutuality although their decisions might as well rest on the doctrine of unconscionability or public policy") (citing *Deutsch*, *Dwyer*, and *Miner*).

B. Plaintiff States A Claim Under New York's False Advertising Law

1. Rule 12(b)(6) Standard

On a motion to dismiss under Rule 12(b)(6), claims should be liberally construed, all facts alleged in a complaint are to be taken as true, considered collectively, and all reasonable inferences should be drawn in the plaintiff's favor. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002); *see Shomo v. City of New York*, 579 F.3d 176, 183 (2d Cir. 2009) (when deciding motion to dismiss, "all reasonable inferences [are drawn] in the plaintiff's favor") (citation and internal quotations omitted).

This approach determines whether a complaint complies with Federal Rule of Civil Procedure 8(a)(2), which requires "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This standard is met "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 556). "A court should not dismiss a complaint for failure to state a claim if the factual allegations sufficiently 'raise a right to relief above the speculative level.'" *Anwar v. Fairfield Greenwich Ltd.*, 728 F.Supp.2d 372, 402-403 (S.D.N.Y. 2010) (quoting *Twombly*, 550 U.S. at 555). The Court's task in ruling on a motion to dismiss is "to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." *Anwar*, 728 F.Supp.2d at 403 (quoting *In re Initial Pub. Offering Sec. Litig.*, 383 F.Supp.2d 566, 574 (S.D.N.Y.2005)).

2. Plaintiff Has Adequately Alleged Injury

Gilt's argument that the Complaint does not adequately allege "injury" under

New York's false advertising statute cannot withstand a careful reading of the Complaint. Specifically, Gilt argues that Plaintiff only alleges that he would not have made his purchase had he known the true composition of the swaddling blankets, *i.e.*, rayon rather than bamboo. However, Gilt completely ignores Paragraph 38 of the Complaint, which alleges the "superior qualities inherent in Bamboo," and Paragraph 43, which alleges that each Class member did not receive "a Product possessing the benefits promised by the advertising claims."

Taken as true and affording Plaintiff the benefit of reasonable inferences, as the Court must do, the Complaint plausibly alleges that Plaintiff did not receive the superior bamboo product promised by Gilt and that Plaintiff is entitled to the difference between what he paid for (bamboo) and what he received (rayon). This alleged injury is plainly actionable under New York's false advertising law. *Ackerman v. Coca-Cola Co.*, CV-09-0395 (JG) (RML), 2010 U.S. Dist. LEXIS 73156, at *88-89 (E.D.N.Y. July 21, 2010) ("Injury is adequately alleged under GBL §§ 349 or 350 by a claim that a plaintiff paid a premium for a product based on defendants' inaccurate representations.") (citing *Jernow v. Wendy's Intern., Inc.*, No. 07 Civ. 3971 (LTS) (THK), 2007 U.S. Dist. LEXIS 85104, 2007 WL 4116241, at *3 (S.D.N.Y. Nov. 15, 2007); *Goshen v. Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 324 (2002)); *see also Ebin v. Kangadis Food Inc.*, 13 Civ. 2311 (JSR), 2014 U.S. Dist. LEXIS 26439, at *3-5 (S.D.N.Y. Feb. 24, 2014).[5]

[5] Plaintiff does not intend by this line of argument to waive his right to recover the full purchase price under one or more theories as pled. Moreover, if the Court were to hold that the Complaint does not adequately allege injury, Plaintiff respectfully requests leave to file an amended complaint, which would be predicated, *inter alia*, on Gilt's advertising of its prices showing bamboo swaddling blankets at approximately 15% above similar swaddling blankets made of rayon.

IV. CONCLUSION

For the reasons stated above, this Court should deny Gilt's Motion to Dismiss in its entirety or, in the alternative, permit Plaintiff to amend his complaint.

Dated: March 18, 2014

For Plaintiff,

s/ Aryeh L. Pomerantz
Aryeh L. Pomerantz
Pomerantz & Pomerantz, PLLC
3 College Rd.
Suite 102
Monsey, NY 10952
Tel. (845) 547-2600
Fax (845) 547-2601
aryeh@pom-law.com

James C. Shah
Shepherd, Finkelman, Miller & Shah, LLP
35 E. State Street
Media, PA 19063
Tel. (610) 891-9880
Fax (866) 300-7367
jshah@sfmslaw.com

Mark Schlachet (0009881)
3515 Severn Road
Cleveland, Ohio 44118
Tel. (216) 896-0714
Fax (216) 514-6406
mschlachet@gmail.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was filed and served on March 18, 2014, via the Court Clerk's ECF system which will provide notice to all counsel of record.

March 18, 2014

s/ Aryeh L. Pomerantz
Aryeh L. Pomerantz